Unbelievable, Inc. d/b/a Frontier Hotel and Casino *and* Local Joint Executive Board of Las Vegas Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 28–CA–12473

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On January 27, 1995, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand this case to the administrative law judge for further proceedings consistent with this Decision and Order.

On June 10, 1994, the Regional Director for Region 28 filed a complaint against the Respondent based upon a charge filed on March 24, 1994, and an amended charge filed on May 11, 1994. As amended at the hearing, the complaint alleges that the Respondent violated Section 8(a)(1) by prohibiting certain employees, alleged to be unfair labor practice strikers, from handbilling at the entrances to the Respondent's premises on or about April 22, 1994. The Respondent's original answer asserted as an affirmative defense, inter alia, that the General Counsel's failure to consolidate this case with a then-pending unfair labor practice proceeding involving the Respondent in *Frontier Hotel & Casino (Frontier III)*, 323 NLRB 815 (1997), before Administrative Law Judge Gerald A. Wacknov constituted impermissible piecemeal litigation, citing *Jefferson Chemical Co.*, 200 NLRB 992 (1972).[1] Although this affirmative defense was omitted from the Respondent's amended answer filed on September 30, 1994, the judge allowed the Respondent to amend its answer at the hearing, after the close of the General Counsel's case-in-chief, to replead the *Jefferson Chemical* affirmative defense.

After the close of the hearing in this case, the judge issued his decision dismissing the complaint on the grounds of impermissible piecemeal litigation as asserted in the Respondent's amendment to its amended answer. Thus, the judge noted that, at the time the complaint in this case issued, the proceeding then pending before Judge Wacknov in *Frontier III* included allegations that the Respondent's employees had been engaged in an unfair labor practice strike. Citing *Jefferson Chemical*, above, *Peyton Packing*, 129 NLRB 1358 (1961), and *Highland Yarn Mills*, 310 NLRB 644 (1993), the judge further found that, because the complaint in this case alleges that the employees who were prohibited from handbilling on the Respondent's premises are unfair labor practice strikers, the complaint in this case was sufficiently closely related to the litigation in *Frontier III* that its litigation in a separate proceeding was barred. Accordingly, the judge dismissed the complaint without reaching the merits. Because he dismissed the case, he declined to grant the Respondent's motion for litigation expenses based on its claim that the complaint was frivolous.

The Charging Party excepts to the judge's dismissal of the complaint on procedural grounds, arguing that the judge misapplied the Board's *Jefferson Chemical* doctrine. The Charging Party also contends that the Respondent's prohibition on handbilling was unlawful regardless of the status of the employees as unfair labor practice strikers. The Respondent, its amended answer notwithstanding, contends that the judge erred in failing to decide the case on its merits and contends that the Board should remand the case to the judge for a decision on the issues raised by the complaint and its motion for attorneys' fees. For the reasons that follow, we find merit to the parties' contentions that the judge should decide this case on its merits.

As the Board stated in *Cresleigh Management, Inc.*, 324 NLRB 777 (1997), ''the General Counsel's decision whether or not to consolidate is subject to review only for arbitrary abuse of discretion.'' (citing *Teamsters (Overnite Transportation Co.)*, 130 NLRB 1020, 1022 (1961)). The General Counsel's discretion is not absolute, however, as

> *Peyton Packing* and *Jefferson Chemical* establish that the Board generally will not permit the General Counsel to relitigate the lawfulness of specific conduct in separate proceedings by asserting that the conduct violates different sections of the Act, and that a decision on the part of the General Counsel not to include conduct encompassed by a pending charge in the complaint may bar a subsequent complaint concerning that conduct. As *Maremont*[2] and *Harrison Steel Castings*[3] make clear, however, the Board does not construe these principles to require that charges filed during the

[1] In *Frontier III*, the Regional Director issued a final, consolidated complaint on August 20, 1992, based on various charges filed between July 16, 1991, and July 15, 1992. The hearing in the case was conducted on various dates between January 4, 1993, and June 22, 1994, and was closed by order dated October 10, 1994. The consolidated complaints involve allegations of threats, interrogation, surveillance, discriminatory discipline, and bargaining violations.

On May 31, 1995, Judge Wacknov issued his decision in *Frontier III* finding, inter alia, that the strike against the Respondent had been an unfair labor practice strike since its inception on September 21, 1991. On May 30, 1997, the Board issued its Decision and Order affirming in part and reversing in part Judge Wacknov's decision.

[2] *Maremont Corp.*, 249 NLRB 216 (1980).

[3] 255 NLRB 1426 (1981).

> pendency of another unfair labor practice proceeding involving the same respondent must be consolidated into that proceeding regardless of the circumstances. To the contrary, except in the specific circumstances presented in *Peyton Packing* and *Jefferson Chemical*, where the General Counsel has attempted to ''twice litigate the same act of conduct *as a violation of different sections of the Act*,'' *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962) (emphasis in original) or to relitigate the same charge in different cases, the Board has recognized that such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases. [*Cresleigh*, supra, 324 NLRB 777.]

Applying these principles to the facts of this case, we find that the General Counsel has not engaged in impermissible piecemeal litigation of the Respondent's conduct and we reject the Respondent's contention that the cases were required to be consolidated into one proceeding. As noted above, *Frontier III* involves allegations of threats, interrogations, surveillance, discriminatory discipline, and bargaining violations. In contrast, the complaint in this case concerns a discrete act, i.e., denial of access to the Respondent's premises, alleged to have taken place on or about April 22, 1994, some 20 months after the final complaint issued in *Frontier III* and 16 months after the start of the hearing in that case. Thus, there has been no attempt by the General Counsel to ''relitigate matters previously litigated under a different provision of the Act.'' *Maremont Corp.*, 249 NLRB at 217.[4]

We recognize that the hearing in *Frontier III* was in progress when the charge in this case was filed. However, we find no basis for imposing on the General Counsel a duty to amend the complaint in Cases 28–CA–11001, et al. to include the allegations presented herein solely on the grounds that the hearing in Cases 28–CA–11001, et al. had not yet closed. *Cresleigh*, 324 NLRB at 779 fn. 5. See also *Harrison Steel Castings Co.*, 255 NLRB at 1427 (recognizing that such a requirement ''would not only severely restrict the General Counsel's discretion, but also allow a respondent to delay indefinitely the ultimate litigation of any charges by simply engaging in further unlawful conduct'').

In this regard, we find that the course of the prior unfair labor practice proceedings involving this Respondent clearly illustrates the strong policy considerations underlying *Cresleigh* and *Harrison*. See *Frontier Hotel & Casino (Frontier I)*, 309 NLRB 761 (1992), enfd. 71 F.3d 1434 (9th Cir. 1995) (charges filed Nov. 1989—Oct. 1990, hearing March 1991), *Frontier Hotel & Casino (Frontier II)*, 318 NLRB 857 (1995), enfd. in part 118 F.3d 795 (D.C. Cir 1997) (first charge filed Nov. 1989, hearing May-Oct. 1991) as well as *Frontier III*, supra (charges filed July 1992, hearing January 1993–June 1994), and the instant case, *Frontier Hotel & Casino (Frontier IV)*, (first charge filed March 24, 1994 hearing October 18–19, 1994). In each of these cases, except the instant case, prior to or during the course of the hearing new charges were filed against the Respondent. If the General Counsel had been required to amend the complaint in *Frontier I* to include the unfair labor practice allegations in *Frontier II*, and subsequently those raised in *Frontier III* and *Frontier IV*, there would to date be no resolution of even the earliest charges filed with the Board.

We further note that the Respondent could, if it wished, have filed a motion to consolidate this case with *Frontier III* following the issuance of the complaint herein on June 10, 1994. As the Board observed in *Cresleigh*, any party may move to consolidate or sever a complaint with any complaint against the same respondent pending before an administrative law judge. When presented with such a motion, the judge has the discretion to determine whether consolidation, or severance, of any complaint is warranted, considering such factors as the risk that matters litigated in the first proceeding will have to be relitigated in the second and the likelihood of delay if consolidation, or severance, is granted. 324 NLRB at 778. Here, the Respondent filed no such motion.

For all the foregoing reasons, we conclude, contrary to the judge, that the complaint in the present case is not barred under *Peyton Packing* or *Jefferson Chemical*. Accordingly, we shall remand this case to the administrative law judge for further proceedings consistent with this Decision and Order.[5]

ORDER

It is ordered that this case is remanded to Administrative Law Judge Clifford H. Anderson for the preparation of a decision containing credibility resolutions, findings of facts, conclusions of law, and recommendations to the Board based on the existing record; and that following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER HIGGINS, concurring.

[4] In finding that the General Counsel had engaged in piecemeal litigation, the judge relied in part on the Board's decision in *Highland Yarn Mills*, 310 NLRB 644 (1993), vacated as moot 315 NLRB 1169 (1994). However, in *Cresleigh* the Board overruled both *Highland Yarn* decisions insofar as they are at variance with the principles set forth above. *Cresleigh*, 324 NLRB at 778 fn. 3.

[5] In remanding this case to the judge for findings of facts, credibility resolutions, and a recommended Order, we express no opinion concerning the merits of the complaint allegations.

For reasons fully set forth in my dissent in *Cresleigh Management, Inc.*, 324 NLRB 777 (1997), I cannot join my colleagues' reasoning. But, consistent with my *Cresleigh* dissent, and for reasons that follow, I join in the result.

The hearing in Case 28–CA–11001, the earlier case, was held between January 4, 1993, and June 22, 1994. (The ''closing'' order was issued on October 10, 1994.) The charge in this case was filed on March 24, 1994, and an amended charge followed on May 11, 1994. As I said in my *Cresleigh* dissent:

> As to charges filed during the trial of the first case, there would be no obligation on the part of the General Counsel to add complaints based on these charges.

Accordingly, in this case, the General Counsel had no obligation to seek consolidation. I therefore join my colleagues in remanding this case to the judge for further consideration.

Lewis S. Harris and *Debra Morgan, Esqs.*, for the General Counsel.
Michael A. Taylor and *Celeste M. Wasielewski, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart)*, of Washington, D.C., for the Respondent.
Richard G. McCracken and *Michael T. McCracken, Esqs. (McCracken, Stemerman, Bowen & Holsberry)*, of Las Vegas, Nevada, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial in Las Vegas, Nevada, on October 18 and 19, 1994. Posthearing briefs were due on November 24, 1994. The matter was heard pursuant to a complaint and notice of hearing issued by the Regional Director for Region 28 of the National Labor Relations Board on June 10, 1994, based on a charge filed by Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Charging Party or the Union) against Unbelievable, Inc. d/b/a Frontier Hotel & Casino (Respondent) on March 24, 1994, and amended on May 11, 1994.

The complaint, as amended at the hearing, alleges that Respondent's agents violated Section 8(a)(1) of the Act in April 1994 by prohibiting its employees who were unfair labor practice strikers from handbilling at the hotel entrances of Respondent's premises. Respondent in its amended answer, as further amended at the hearing, denied that it had violated the Act and raised certain affirmative defenses.

On the entire record herein, including helpful briefs from the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent has at all times material been a Nevada State corporation with an office and place of business in Las Vegas, Nevada, where it operates a hotel and gaming facility. Respondent in its operation of the business noted above annually enjoys revenues in excess of $500,000 and annually purchases and receives goods and materials at its facility directly from points located outside the State of Nevada of a value in excess of $50,000.

The complaint alleges, the answer admits, and I find that Respondent at all times material has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent owns and operates a hotel and gambling hall on Las Vegas Boulevard (the Strip) in Las Vegas, Nevada. The Union represents certain employees of Respondent and, as of the time of the hearing, was conducting a strike against Respondent which had commenced on or about September 21, 1991.

The parties have been in other litigation before the Board. The Board found that Respondent had committed certain violations of the Act on December 7, 1992, in a decision reported at 309 NLRB 761 (1992). Administrative Law Judge James M. Kennedy issued a decision in JD–(SF)76–92 on May 28, 1992, finding that Respondent had committed certain other unfair labor practices. That decision is now before the Board on exceptions.

A third proceeding against Respondent is now pending before Administrative Law Judge Gerald Wacknov.[1] Coincidentally, the record in Judge Wacknov's cases was closed by order on October 18, 1994, the first day of the instant hearing. In the cases before Judge Wacknov, as part of broad set of allegations, the General Counsel contended that the strike being conducted by the Charging Party here was an unfair labor practice strike caused by Respondent's unfair labor practices.

The General Counsel's theory of a violation in the instant case includes the proposition that the employees wrongfully prohibited by Respondent from handbilling at the entrances to Respondent's hotel were unfair labor practice strikers in the continuing strike and derived certain enhanced rights as

[1] A series of cases: Cases 28–CA–11001, 28–CA–11026, 28–CA–11057, 28–CA–11075, 28–CA–11111, 28–CA–11143, and 28–CA–11549 were included in various complaints that were consolidated for a common hearing which commenced in January 1993 before Administrative Law Judge Gerald Wacknov. Judge Wacknov closed the record in those cases by order dated October 18, 1994. The decision in the consolidated cases before Judge Wacknov is pending.

a result of that status. The evidence offered by the General Counsel to support the contention that the employees were unfair labor practice strikers, which Respondent disputed, was taken from the record in the case now before Judge Wacknov.[2]

In the instant case the General Counsel initially moved that any decision in the instant case be delayed until ''there has been a resolution of the nature of the strike, as alleged, in [the matter before Judge Wacknov].'' I denied that motion. Counsel for the General Counsel also noted that the General Counsel had never moved to consolidate the instant case with the cases before Judge Wacknov or any of the other predecessor cases.

B. *Threshold Issue: Allegation of Impermissible Multiple Litigation*

Before dealing with the merits of the unfair labor practice allegation of the complaint, it is appropriate to deal with a procedural argument raised by Respondent in its answer.[3] Respondent asserts that the merits of the General Counsel's complaint need not be reached because the General Counsel is precluded from bringing the instant action given the earlier independent litigation of complaint allegations against Respondent.

1. The arguments of the parties

Respondent initially argues that the instant complaint constitutes impermissible multiple litigation by the General Counsel. Thus, Respondent notes that the General Counsel was at all times well aware of the ongoing matters before Judge Wacknov throughout the life of the instant case and chose not to move to consolidate this case with those before Judge Wacknov. Respondent argues that inasmuch as the instant case in essence relitigates matter litigated before Judge Wacknov, the instant case should be dismissed under the Board's prohibition of multiple litigation as set forth in *Jefferson Chemical Co*., 200 NLRB 992 (1972).

The General Counsel does deny that the subject matter of the instant case was known to the General Counsel during the evidentiary stage of the litigation of the cases before Judge Wacknov. Rather the General Counsel contends the Board's restriction on multiple litigation does not apply to the instant case because the issues in the instant case and the matters before Judge Wacknov are neither related in time nor in legal theory. Thus, the General Counsel notes that the allegations before Judge Wacknov deal with bargaining and other matters occurring before the commencement of the strike in April 1992 while the instant case concerns a single act by Respondent prohibiting employees from handbilling in April 1994. The General Counsel argues therefore that the two matters are insufficiently factually related to invoke the multiple litigation prohibition cases. Further, the General Counsel argues that the nature of the violation of the Act alleged in the instant case as well as the legal arguments offered both in support of and in opposition to the allegation are not related to the bad-faith collective-bargaining allegations and arguments presented to Judge Wacknov.

Respondent argues to the contrary that the instant and Judge Wacknov cases are in fact closely related. Respondent notes that one allegation before Judge Wacknov is that the employees on strike are unfair labor practice strikers and that the General Counsel is making the identical contention in the instant case. Respondent notes that the General Counsel is relying exclusively on evidence submitted in the earlier litigation to establish the existence of an unfair labor practice strike in the instant litigation.

2. Relevant cases

The General Counsel and Respondent provided a scholarly marshaling of cases on brief respecting this issue. Several of the cited cases are worthy of discussion here.

The Board in *Peyton Packing Co*., 129 NLRB 1358 (1961), addressed a situation where the General Counsel had separately litigated two complaints: the earlier complaint contending that an employer bonus to employees was a violation of Section 8(a)(1) of the Act and a related unfair labor practice strike and the later complaint contending that the bonus was a violation of Section 8(a)(5) of the Act and, as amended at the hearing, that the strike was an unfair labor practice strike.

The Board ruling on the latter complaint found the relitigation of the bonus and the unfair labor practice strike to be improper. The Board held at 1360:

> Generally speaking, sound administrative practice, as well as fairness to respondents, requires that consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but once single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondents. [Fn. omitted.]

The Board found such multiple litigation to be an abuse of process and held it would not be permitted to occur in *Jefferson Chemical Co*., 200 NLRB 992 (1972), now the lead case in the area. In *Maremont Corp*., 249 NLRB 216 (1980), the Board created an exception to its multiple litigation prohibition in circumstances where additional allegations arise during the trial of the earlier litigation and the General Counsel's attempts to litigate the new allegations as part of the earlier litigation are opposed by Respondent. The Board specifically noted that matters uncovered during the trial of an earlier case need not necessarily be included in that earlier trial if the result is a delay in that proceeding.

In *Highland Yarn Mills*, 310 NLRB 644 at 644–645 (1993), the Board restated the ''closely related portion'' of its multiple litigation prohibition standard:

> [O]nce a respondent has made a prima facie showing under *Jefferson Chemical*, we believe the burden shifts

[2] The General Counsel on brief argues specifically that the strike was an unfair labor practice strike, that the employees who were prohibited from handbilling on Respondent's premises were unfair labor practice strikers and that the employee had enhanced rights to be free of such prohibitions as a result of such unfair labor practice strikers status. The General Counsel specifically noted at fn. 4, p. 8 that the unfair labor practice strike issue was ''squarely presented'' in the matters before Judge Wacknov.

[3] Respondent in its original answer specifically pled as an affirmative defense that the instant action was ''barred by the holding in *Jefferson Chemical Co*., 200 NLRB 992 (1972).'' The assertion was omitted from its amended answer, but was restored to the amended answer by motion granted at trial.

> to the General Counsel to rebut that showing. More particularly, if a respondent shows that the allegations of a ''new'' complaint pertain to events that occurred prior to the hearing in an earlier case and that these new allegations are closely related to the allegations of the earlier case, the burden shifts to the General Counsel to show . . . that the allegations of the new complaint are not closely related to the allegations of the earlier case.

3. Analysis and conclusions

The cited cases and the position of the parties make it clear that the main issue[4] in contention respecting the multiple litigation prohibition aspect of the instant case is whether or not the single complaint allegation in the instant case is sufficiently ''closely related'' to the complaint allegations in the consolidated proceedings before Judge Wacknov. Specifically the issue is whether or not the General Counsel's allegation that Respondent wrongfully prohibited unfair labor practice striking employees from its hotel entrances in April 1994 is closely related to the General Counsel's allegation that the strike commencing in April 1992 was an unfair labor practice strike.

The General Counsel's factual presentation in support of the unfair labor practice strike allegations in Judge Wacknov's case, in whole or in part, was the sole source of the evidence offered in the instant case to establish that the strike commencing in 1992 and continuing at least to the time of the trial herein was an unfair labor practice strike. The evidence therefore, as to that portion of the case, was not only closely related, but may be regarded as essentially identical to the evidence offered before Judge Wacknov. The commonality of the unfair labor practice strike issue between the two matters in litigation was made clear by the General Counsel's request that I defer the issuance of my decision herein until the unfair labor practice strike issue was resolved in the litigation now before Judge Wacknov.

The unfair labor practice strike contention of the General Counsel is, however, but a portion of the General Counsel's theory of a violation in the instant case and only one of many contentions in the cases before Judge Wacknov. Thus while there is a degree of overlap between the two cases, it does not involve a substantial part of either litigation. Further, as the General Counsel argues, the events at the heart of the instant case occurred 2 years after the onset of the strike and the bulk of the legal issues between the case are completely independent. Thus, to the extent the two cases are related, it may be said that they are related only because they contain a single overlapping aspect.

Given all the above and noting that the Board has assigned the burden of establishing that multiple litigation is not related to the General Counsel once Respondent has established its prima facie case of impermissible litigation, I find that the General Counsel's case herein is sufficiently related to the litigation now before Judge Wackanov to be precluded by the Board's *Jefferson Chemical* doctrine. Given this findings and inasmuch as there is but a single allegation of a violation of the Act in the instant complaint, I shall dismiss the complaint in its entirety.

I reach this conclusion because, while the issue is not free from doubt, I find that the multiple litigation prohibition on closely related cases applies here because there is a concurrence of the unfair labor practice strike contention in each case. Although it is true that such a contention is but a portion, perhaps even a minor portion, of the General Counsel's case before me, there is no doubt that the factual and legal arguments on this issue before Judge Wacknov in the earlier proceeding and before me in the instant proceeding are at the very least closely related. The critical element in this finding is the further conclusion, which I specifically make here, that the Board's ''closely related'' test may be satisfied by the existence of a close relationship between relatively small parts of cases as well as by larger degrees of relatedness.

I find this is so because, even if a portion of cases are closely related, respondents must relitigate at least that coextensive portion of the earlier case. The Board's multiple litigation prohibition doctrine does not appear to limit its reach to particular quantifiable areas of overlap or relatedness. Thus there does not seem to be some established limit to the extent a respondent may be exposed to multiple litigation.

Further, related or, as herein, identical issues of fact or law which must be resolved by the trial court or reviewing authority may present potential problems, of differing results reached by different bodies. The risk of confusion resulting from inconsistent determinations in multiple litigation of similar or identical questions of fact or law, irrespective of the relative importance of such issues to one or both cases in litigation, is simply another reason for avoiding multiple litigation or the same or related issues irrespective of their size or significance in the particular cases at issue.

The test in my view of the quantum of relatedness necessary to invoke the Board's multiple litigation prohibition doctrine, beyond the de minimus standard which is implicit in all legal reasoning, is the need for judicial findings respecting the issue advanced as related between the cases. Here the issue of argued commonality is the existence of an unfair labor practice strike. The cases now in litigation each require a specific finding on the issue. The cases before Judge Wacknov require such a finding to resolve issues in the complaint. The General Counsel's allegation in the instant complaint, quoted supra, likewise requires resolution of this issue. If differing findings respecting the unfair labor practice strike status of the dispute at Respondent's premises were to be made in Judge Wacknov's and my cases either at the trial stage or thereafter in the review process, the problems of multiple related litigation would be well demonstrated.

Summarizing, based on all the above, I find the cases before Judge Wacknov and before me here are closely related. I further find that the General Counsel was well aware of the matters before Judge Wacknov throughout the life of the instant charge and complaint and took no action to consolidate the matters, choosing rather to litigate the cases independ-

[4] The General Counsel also argues on brief at 25 that the instant case is most analogous to the situation presented in *Maremont Corp*., supra. As noted however, *Maremont* presented the situation where new matters were raised during the litigation of the earlier litigation and the Board declined to force the General Counsel to include the new matters in the earlier litigation at the cost of delaying the trial. In the instant case, the two charges and complaints existed independently from June to October 1994 without a General Counsel motion to consolidate the cases. The long period during which the General Counsel took no action to consolidate the two proceedings clearly distinguishes the instant case from *Maremont.*

ently. Given these findings, I further find that the Board's decision in *Jefferson Chemical Co*. applies to the instant case and that the instant case is, therefore, an impermissible multiple litigation prohibited by the Board. I shall therefore dismiss the complaint in its entirety.[5]

[5] Respondent argues that even though the instant litigation is impermissible under *Jefferson Chemical*, I should determine the legal issue of employee access to Respondent's premises ''because it is a certainty that the Union will again test the Respondent's policy.'' I reject Respondent's argument that the instant the matter should be decided on its merits irrespective of the fact that it should be dismissed on procedural grounds. The likelihood of future conduct producing similar allegations in future charges or complaints is not a basis for deciding issues which would not otherwise be reached. Should the determination that the instant case is disposable under the Board's prohibition of multiple litigation be sustained by reviewing authority, the parties will have to await fortune and circumstance to test their legal theories in a different case.

Given my dismissal of the case based on the multiple litigation prohibition of the Board, I do not herein address the underlying merits of the complaint allegations. Given this fact, I decline to grant Respondent's motion for special relief based upon its claim the General Counsel's legal theory is frivolous.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The complaint is closely related to the complaint in Cases 28–CA–11001, 28–CA–11026, 28–CA–11057, 28–CA–11075, 28–CA–11111, 28–CA–11143, and 28–CA–11549, which were before Judge Wacknov at a time when the instant matter was pending, and is therefore not susceptible to litigation independent of that case.

4. The complaint may therefore not be maintained.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.